1 The transformations of some classical principles in socialist Hungarian civil law

The metamorphosis of *bona fides* and *boni mores* in the Hungarian Civil Code of 1959

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On the historical background

As is well known, the concepts of *bona fides* and *boni mores* originate in Roman law. Before examining their fate in the socialist Hungarian civil law, it is necessary to refer briefly to the relationship between Hungary and the Roman law tradition. Until the middle of the 19th century, the Hungarian legal system did not belong to civil law jurisdictions. Apart from during the Roman times, Roman law has never been the law in effect in Hungary. In the Middle Ages as well as in the early modern period, Hungary had a conservative national customary law strongly characterised by feudalistic features. In these times, Roman law only had a limited impact on the development of Hungarian law (Bónis, 1964; Zlinszky, 1983, pp. 56ff; Hamza, 2009, pp. 366ff).

The modernisation of Hungarian law in terms of the reception of the Roman law tradition—I am speaking now about private law—began in the 19th century. Hungarian private law acquired a civilian (Roman law) character due to the introduction of the Austrian Civil Code (*Allgemeines bürgerliches Gesetzbuch*, ABGB) in 1853. Some years later, the ABGB was repealed but, as a matter of course, it was hardly possible to return to the old Hungarian private law. Judicature and other factors of legal development aimed for the creation of a modern Hungarian private law, mainly on the basis of German law (besides the impact of the Pandectists, it was in a certain period especially the Saxon Civil Code of 1863 which was regarded as a model code for developing the Hungarian private law), but the Austrian law and later (after the First World War) sometimes the Swiss law were taken into consideration as well.[1] At the end of the 19th century and in the first decades of the 20th century, several drafts of a Hungarian Civil Code were elaborated, even presented as bills to the Hungarian Parliament, but they were never adopted. Among these drafts, especially the last one, the Private Law Code of Hungary in 1928 is to be stressed, not only because of its high professional level, but also because of its considerable impact on the judicature, which tacitly recognised it as an effective source of law (cf. Zlinszky, 1983, p. 65; Földi, 1988, pp. 364ff; Képes, 2016, pp. 112f).

As far as the social-historical context of the development of Hungarian private law before the First World War is concerned, it is to be noted that this development took place within the framework of the Austro-Hungarian Monarchy. After the Compromise between Austria and Hungary was concluded in 1867, a golden age began for Hungary for some decades when both the economy and culture developed to a great extent (Rigó, 2017). These decades were dominated by the increasing influence of liberal ideas. In this context, it is important to refer to the emancipation of Jews in Hungary (Act No. XVII of 1867) and to their continuously growing role in the Hungarian economy and society. The Tiszaeszlár blood libel trial in 1882 and 1883 showed the presence of antisemitism in Hungary, but in spite of antisemitic agitation, the rule of law triumphed.

Unfortunately, the First World War did not only break the *belle époque*, it also led to the fall of the Austro-Hungarian Monarchy in 1918. It is not so much the emergence of new national states that is to be lamented in this respect but rather the loss of a number of high values, especially the devaluation of liberal ideas, not to mention socialist ones.

The definitive end of the liberal period of the former decades was marked by a short communist intermezzo that took place in 1919, namely, the formation of the first communist regime in Hungary on the March 21, 1919. The so-called 'Hungarian Soviet Republic' led by Béla Kun (1886–1938) had extremist ideas and applied terrorist means. It collapsed after 133 days. Since the majority of communist politicians leading the Soviet Republic of 1919 were of Jewish origin, albeit they were not members of the Jewish community, antisemitism in Hungary became stronger in the interwar period and it became a part of government policy as early as 1920 (Karady and Nagy, 2012).

The restoration of the Kingdom of Hungary in 1920 was possible in a territory reduced to two-thirds of its original size. Due to the Trianon Treaty of 1920, Hungary lost not only large and important territories, but also more than a quarter of native Hungarians suddenly found themselves outside of Hungarian borders, mainly in Romania, Czechoslovakia, and Yugoslavia. After such antecedents, from 1920 a national Christian course prevailed in Hungarian politics, characterised by strong anticommunism and increasing antisemitism as well as antiliberalism.

In the framework of the present study, I can refer only briefly to the tragic events of the Second World War and of the Holocaust that afflicted Hungary to a tragically great extent. The political and moral responsibility of the Hungarian governments and other influential political factors should not be underestimated in this respect. Between September 1944 and April 1945, the territory of Hungary was liberated or, as it turned out later, occupied by the Soviet Red Army. Soviet troops left the country only after the fall of communism in 1991. The Hungarian Communist Party took power in 1948 and in the same year the communist (called 'socialist') transformation of the Hungarian legal system began.

Creation of the first Hungarian Civil Code of 1959

In this transformation process, the greatest task was the creation of the first Civil Code of Hungary. The codification works began in 1953 and it was on July 30, 1959, that the Parliament adopted the Civil Code of the People's Republic of Hungary as Act No. IV of 1959. The Civil Code entered into force on May 1, 1960, and after several amendments remained in force until March 15, 2014, when the new Civil Code (Act No. V of 2013) entered into force.

Hungary in the 1950s as well as other socialist countries in Europe experienced a dark era characterised by massive brutality from the communist party, which made use of the state organs. On the other hand, there were a number of highly qualified jurists who had, fortunately, an important role in the gigantic project of civil law codification in Hungary. As we know from history, legal science (or at least the validity of private law) and a totalitarian regime do not necessarily exclude each other. The classical Roman jurists as well as the excellent jurists of Justinian worked in an autocratic empire (cf. Honoré, 1973–1974, p. 869).

As for the preparation of the first Hungarian Civil Code (Act No. IV of 1959), which began in 1953, its main drafters were Miklós Világhy (1916–1980), Gyula Eörsi (1922–1992), Endre Nizsalovszky (1894–1976), Elemér Pólay (1915–1988), and Béla Kemenes (1928–2000). Nizsalovszky was perhaps the greatest Hungarian private lawyer of his time. From 1938 he was the Professor of Civil Procedure Law at the University of Budapest, and from 1943 he was also Professor of Private Law there. He was a member of the Hungarian Academy of Sciences from 1939. He is mentioned in third place in the list given above because as a non-communist, he could have only a limited influence on the actual codification.

It was in fact remarkable in those times that Nizsalovszky was invited to the codification committee at all. Many of his colleagues, having been labelled 'bourgeois scholars,' were forced to retire between 1945 and 1950; if they had been members of the Academy of Sciences, as a rule they lost their membership. Nizsalovszky, however, was an extremely renowned legal scholar, and he was, moreover, politically more liberal than conservative being by no means hostile towards progressive ideas prior to the Second World War.[2]

The leading members of the codification committee were Világhy and Eörsi. Formerly as law students they had been Nizsalovszky's pupils. A semi-official letter written by Nizsalovszky to Eörsi in 1954 attests that the esteemed professor treated his young colleague as a good friend (see Bodzási, 2018, fol. 16, pp. 1146ff). In spite of their 'bourgeois' family background, both Világhy and Eörsi as persons open to new ideas—Eörsi being in addition a Holocaust survivor—became convinced communists after 1945. They were appointed Professors of Civil Law at the University of Budapest in 1953 and later also became members of the Hungarian Academy of Sciences. The fact that the Civil Code of 1959, despite some socialist institutions, remained a Romanistic one is especially due to Világhy and Eörsi who, possessing a certain political influence, could successfully insist that a number of classical traditions of private law be preserved.

At this point, the Soviet jurists to some extent controlled to what extent socialist principles were present in the new Hungarian Civil Code. A well-known Soviet jurist, Anatolii Venediktov (1887–1959), professor at Leningrad State University and member of the Soviet Academy of Sciences (cf. Benevolenskaya, 2013, pp. 173ff), sent a letter containing general observations on the draft of the new Hungarian Civil Code in December 1957. Venediktov welcomed the fact that the new Hungarian Civil Code as the first socialist civil code would not contain a general part (cf. Baldus and Dajczak, 2013).[3] Venediktov adds, however, that just that is why the preliminary provisions should be more detailed than in a civil code having also a general part. Lacking a Russian translation, Venediktov, as he himself observed, was not in a position to ascertain whether the preliminary provisions in the Hungarian draft contained to a satisfactory extent the principles of socialist civil law, even if taking into account the current lower stage of the development of socialism in Hungary.[4] A less rigorous and at the same time a less detailed letter was sent by the Institute of Legal Sciences of the Soviet Academy of Sciences (Antimonov, Bratus, Sadikov) to Gyula Eörsi in May 1958 (Bodzási, 2018, fol. 8, pp. 567ff).

As highly qualified jurists, although hardly being convinced communists, Pólay and Kemenes had important roles in the codification. They were appointed professors at the University of Szeged in 1951 and 1961, respectively. Pólay was especially renowned as a scholar of Roman law.[5]

As for the preparatory materials of the Civil Code of 1959, it is an advantageous recent development that on the basis of a mandate given by the Minister of Justice of Hungary these materials stored in the National Archives of Hungary were digitalised in 2015 and 2016 (Verebics, 2017, p. 12). These materials, amounting to 16,000 pages, were rendered accessible online in 2018 (Bodzási, 2018). A part of these documents was published in printed form in 2017, and the corresponding volumes are also accessible online.[6]

The materials mentioned above—typically typed, sometimes written with a pen, and sometimes printed—attest that the preparation of the Hungarian Civil Code of 1959 was carried out at a highly professional level. Excellent jurists who had been educated during the previous era took part in the work and clearly did their best. It is characteristic of the high professional standards that both a former project of the famous Professor of Roman law, Géza Marton (1880–1957),[7] and a study written by Ferenc Mádl (1931–2012)[8] were taken into account with regard to civil liability regulations.

The coming into being of the socialist equivalent of *bona fides*

In the framework of the present study, I will deal with the socialist transformation of two classical principles of private law, namely, that of 'good faith and fair dealing' (*bona fides*) and that concerning the prohibition of contracts 'contrary to good morals' (*contra bonos mores*).

The Bill of a Private Law Code for Hungary, published in 1928 mentioned above, contained, similar to the Swiss Civil Code (para. 1 of art. 2), the principle of 'good faith and honesty' (section 2) and also contained, like the French 'Civil code' (*Code civil*) (old art. 1133), the prohibition of contracts 'contrary to good morals and public policy' (section 973). From 1949 these concepts were regarded in Hungary as being incompatible with socialist civil law. These notions were regarded as expressions of the relationships of capitalism. This evaluation was reflected not only in the Hungarian legal literature of the 1950s but also in the subsequent decades.

Eörsi laid down in his monograph on the development of ownership published in 1951 that the principle of good faith applied in the traffic of goods, i.e., 'good faith and fair dealing' (*Treu und Glauben*) served as an instrument to moderate the impoverishment ('proletarisation') of small capitalists and to prevent anarchy. He regarded this principle as a reflection of the impotence and class character of the imperialist patrimonial law (Eörsi, 1951, II, 65, 388). In a later monograph published in 1965, Eörsi ascertained that 'good faith and fair dealing' had been inserted into the German and Swiss civil codes as an 'alien body' since these codes reflected the cold business mentality of capitalism. Eörsi added that the principle of good faith was a 'rubber rule' that generated legal uncertainty (Eörsi, 1965, p. 72).

In 1965 a monograph of Imre Sárándi was published about the abuse of rights. Sárándi explains that good morals, the habits of an honest man, and good faith and fair dealing are bourgeois principles, the content of which is always being established in accordance with the current class interests of monopoly capitalists (Sárándi, 1965, p. 69). In the following year, a monograph by László Asztalos was published on sanctions in civil law. Being a highly qualified jurist, Asztalos was an expert on both civil law and legal history. He also considered the principle of 'good faith and fair dealing' to be a symptom of the crisis of monopoly capitalism (Asztalos, 1966, p. 153; see similarly Szabó, 1964, p. 99).

In his comprehensive book on comparative private law published in Hungarian in 1975 and also in English in 1979, sometimes called the 'socialist Zweigert/Kötz,' Eörsi regarded 'good faith and fair dealing' to be the most efficient instrument of monopoly capitalist law that served as a 'Jack of all trades' (*Mädchen für alles*) (Eörsi, 1975, pp. 452ff; idem, 1979, pp. 476ff). In 1981 Eörsi evaluated the principle of good faith in a more positive manner, at least as regards the *United Nations Convention on Contracts for the International Sale* of 1980, otherwise known as the Vienna Convention. Eörsi welcomed the weakening of the former *rigor commercialis* and expressed his hope that the principle of good faith would play a greater role during the actual application of the Convention rather than being a compromise merely worked out on paper among the representatives of the United Nations member states (Eörsi, 1981, pp. 19f).

References to the capitalist character of 'good faith applied in the traffic of goods' can also be found in the preparatory documents of the Civil Code of 1959. In a document written by Gyula Eörsi and Béla Csánk in 1951, it is emphasised that the good faith applied in the traffic of goods is a product of the

constant crisis of capitalism that had to alleviate the antagonistic conflicts especially in favour of the small capitalists so that they would not become proletarians. The authors ascertained that such conflicts would not arise in people's democracies (Bodzási, 2018, fol. 4, p. 831).[9]

Since the principle of 'good faith and honesty' laid down in the Bill of 1928 was considered a bourgeois concept, it was replaced by new principles in section 4 of the new Civil Code. The text of paragraph 1 was published in the following form: 'In the course of exercising their rights and fulfilling their duties the parties in civil law relations shall display such a conduct that enforcement of their interests shall be in harmony with the interest of society.'

The coming into being of this passage can be observed very well in the light of the preparatory documents. In some versions up to December 1958, the reference was not made to the interests of 'society' but to those of the 'community.'[10] Moreover, in the first drafts up until 1957, the expression 'interest of the public' applied.[11] The reference to 'society' was in this way the third stage in a development during which the drafters were always looking for a better expression. I think that the word 'society' was finally preferred because as a rather abstract notion, it could serve as a milder means regarding the limitation of private autonomy.

Paragraph 2 of section 4 in its published form laid down that '[i]n civil law relations [the parties] shall cooperate mutually and act in compliance with the requirements of socialist coexistence. Cooperation shall be realised by the exact fulfilment of duties and by such an enforcement of rights which is in compliance with their [social] destination.' This formulation appeared already in the first Draft of 1955. Later only small corrections of a stylistic nature took place.

The duty of mutual cooperation laid down in this passage can be regarded as a progressive idea that spread from the 1950s in Western legal cultures and is present also in art. III. 1:104 of the *Draft Common Frame of Reference* (Bar et al., 2009, I, pp. 685ff). The reference to the requirements of socialist coexistence is of ideological nature, but it is not to be regarded as a limitation on private autonomy but much more as a principle requiring consideration of the interests of other persons and in this way it constitutes continuity with the classic principles of good faith and honesty.[12]

The next phrase contains strict rules concerning both parties of the civil law relations. The requirement of exact fulfilment of duties is in a way contrary to the classical principle of good faith, which sometimes renders possible a milder treatment of the debtor's duties (cf. Brox, 2000, p. 149; idem, 1984, p. 91; Medicus, 1999, p. 113). It is to be noted that the vision of a negligent debtor could have a role when drafting this rule, against whom the legislator had to protect the other party. The reference to the exercise of rights is a sign of a significant extension of the prohibition of chicane in socialist civil law, which is more thoroughly explained in section 5 treating the abuse of rights.

In the first versions of the Draft, a third paragraph in section 4 laid down that '[t]he socialist organisations exercise their rights in order to fulfil their duties based upon the plan of the people's economy' (see the Draft of 1955 in Bodzási,

2018, fol. 16, p. 233). This paragraph, however, was deleted at the end of 1956 or somewhat later and was not included in the final text.[13] The deletion of this paragraph is a sign that the socialist character of the draft of the Civil Code was moderated.[14]

In the first Drafts, such provisions in section 4 were substituted for the former principle of good faith and honesty. One similarity to para. 2 section 2 of the Bill of 1928 is that section 4 of all versions of the draft was followed by a section 5 containing the prohibition of the abuse of rights, albeit the effectiveness of the prohibition was significantly extended.

Neither the expression 'good faith' nor the word 'honesty' appeared in the various versions of section 4. 'Fair dealing' is not mentioned in these texts, either. It is still more remarkable that not even the first versions of the rationale contain any reference to the fact that section 4 was substituted for the former principle of good faith and honesty.[15]

As referred to briefly above, these classical notions were omitted since they were regarded as reflections of capitalism. On the contrary, emphasis was laid on collective aspects, namely on the interests of society, and on the relationships between parties, especially on their duty of cooperation. At the same time, only the expression 'socialist coexistence' has an explicit ideological connotation in these provisions.

During the preparation of the Civil Code, proposals were made suggesting preserving some reference to good faith. Among the preparatory materials, a voluminous study amounting to 100 pages can be found that was presented in November 1957 by judge Kornél Berndt. This study contained an explicit proposal to insert into the Civil Code the principle of good faith and honesty with reference to a similar provision in the Bill of 1928 (Bodzási, 2018, fol. 16, p. 72).[16] It is not surprising that this proposal was rejected. It is in fact more remarkable that the Bill of 1928 could be referred to as a model. In this era, the entire old Hungarian law was regarded by a number of influential communist jurists to be an obsolete reflection of capitalism with some surviving elements of feudalism. Indeed, in the 1950s, the interwar period was often referred to as the era of Horthy fascism.[17]

In the beginning of 1959, the Hungarian minister of foreign affairs, Endre Sík (1891–1978), proposed that the presumption of good faith should be inserted into the Preliminary provisions of the Civil Code, similar to section 3 of the Bill of 1928. This proposal was rejected with the explanation that the new code would have a more severe regulation and, in some cases, even the presumption of bad faith had to apply. Such an inverse presumption of bad faith could be feasible, in particular, if 'capitalist elements' were concerned who were, however, slowly disappearing from Hungarian society (see Bodzási, 2018, fol. 8, p. 107).

Even if such conservative efforts failed, they had still some consequences, namely, some surrogates for the missing classical principle of good faith and honesty were finally inserted into the Civil Code. At the end of 1957 or somewhat later, somebody noted the Latin word *nemo* written in pen in a copy of the Draft published in printed form in the autumn of 1957, in the rationale of

section 4 (see Bodzási, 2018, fol. 11, p. 701). This was obviously a reference to the maxim 'no one alleging his own turpitude is to be heard' (*nemo suam turpitudinem allegans auditur*). As a consequence, in the Draft of December 1958, a third paragraph appeared in the text of section 4, laying down that '[n]obody can rely on their own misfeasance in order to acquire an advantage. […]' (See Bodzási, 2018, fol. 14, p. 4.)

A further supplement concerning good faith and honesty appeared in the Draft published in the autumn of 1957. It is in the third paragraph inserted into section 5, which deals with the abuse of rights. The new provision laid down that '[t]he court may obligate to full or partial reparation the person whose intentional behaviour has induced another person in good faith to such an action whereby the latter has suffered a damage through no fault of his own.' This paragraph became in the Draft of December 1958 the separate section 6 (see Bodzási, 2018, fol. 14, p. 4). This state of affairs is known as 'implicit conduct,' and it preserved its position and wording also in the published version.[18] The text of the provision as well as the rationale to the (final) section 6 attest that the 'implicit conduct' was really a surrogate for the lack of good faith. The text of the provision contains an explicit reference to the 'good faith' of the possible plaintiff and the rationale refers several times to the importance of 'confidence in good faith.'

Can we say that the classical principle of good faith and honesty could survive in a way in the Civil Code of 1959 due to the provision on implicit conduct? I am afraid that the answer to this question has to be negative since the good faith referred to hereby is the so-called subjective good faith (in German *guter Glaube*), while the classical principle of good faith and honesty is connected with the objective good faith (in German *Treu und Glauben*).[19]

A further impact of the conservative proposals mentioned above can be verified in the ministerial rationale to the Bill of 1959 which was later published together with the norm text of the Civil Code. While the former drafts of the rationale did not refer to this problem at all, the rationale in its final form observes that the Bill does not lay down the presumption of good faith, although such a presumption can be found in the Bill of 1928, in many bourgeois civil codes and also in article 5 of the 'Polish General Part' of 1950 (of a Polish civil code being that time scheduled only). The further explication treating 'good faith and fair dealing' as well as the good faith of the possessor without any distinction shows that the drafter of the rationale was unable to distinguish between the subjective and the objective meanings of good faith (Hungarian Civil Code of 1959, hereinafter HCC, 1959, p. 25).

Even if considering the confusion of the meanings of good faith in the rationale, it was advantageous that the norm text of the Hungarian Civil Code of 1959 emphasised some objective standards instead of laying down the principle of good faith and honesty. Thanks to this solution, in the subsequent decades, there was no Hungarian jurist who would have confused the objective and the subjective senses of good faith, at least not within Hungarian civil law. The terminology applied by the Civil Code of 1959 guaranteed that good faith meant only (or overwhelmingly) the subjective state of mind, while the principle of

objective good faith (and honesty) had an entirely different terminology. The advantage of the solution preferred in the Hungarian Civil Code of 1959 is obvious if we compare it with para. 3 of art. 1134 of the French *Code civil* of 1804 (abrogated in 2016) that laid down that 'the contracts shall be performed bona fide' ([e]*lles* [viz. les conventions—A. F.] *doivent être exécutées de bonne foi*). This provision, namely the ambiguous term *bonne foi,* constituted one source of confusion concerning subjective and objective good faith in French civil law (cf. Tallon, 1994, p. 12).

Developments since the Novel of 1977

As far as the subsequent fate of section 4 is concerned, during the preparation of the Novel of 1977, László Asztalos proposed that the prohibition of unfair business activity and unfair profit making be inserted into the preliminary provisions (Asztalos, 1976, p. 120). A more radical proposal was made by Imre Sárándi, who suggested laying down the principle of exercising rights and duties in compliance with their destination and in good faith (Sárándi, 1977, pp. 35ff). Asztalos's proposal was accepted to some extent and the Novel (Act No. IV of 1977) laid down the prohibition of unfair business activity in para. 2 of section 4. Sárándi's proposal including the restoration of the principle of good faith could not be accepted at that time.[20]

As far as the background of the Novel of 1977 is concerned, in 1968 a significant modification of the regulation of the economy took place in Hungary, namely, the so-called 'new economic mechanism' was introduced that was aimed at diminishing the role of central planning and at increasing the role of market relations.

It was only Act XIV of 1991 that later restored the classical principle of good faith and honesty overwriting para. 1 of section 4. Since 'good faith' meant in Hungarian civil law for some decades (between 1960 and 1991) an exclusively subjective notion, the restoration of the classical principle caused considerable misunderstandings. Most jurists did not remember the principle of 'good faith and honesty' as being formerly fixed by the Bill of 1928 (Földi, 2003, pp. 82ff). An amendment, namely Act No. III of 2006, was required to make matters less ambiguous, both by means of some slight corrections of the relating terminology and through the relating rationale, namely that in Hungarian civil law objective and subjective good faith are to be distinguished (Földi, 2007, pp. 53ff). In the new Hungarian Civil Code (Act. No. V of 2013), the same terminology applies (para. 1 of section 1:3; cf. Földi, 2016, pp. 173ff).

The coming into being of the socialist equivalent of *boni mores*

The Bill of 1928, mentioned several times above, contained not only the principle of good faith and honesty (its section 3, being similar to art. 2 of the Swiss Civil Code) but also, similar to the French civil code (*Code civil*) (old art. 1133),[21]

the prohibition of contracts 'contrary to good morals and public policy' (section 973). Just as the principle of good faith and honesty was not compatible with socialist ideas, so, too, this was the case with regard to *boni mores*. That is why a new provision was substituted for *boni mores* in para. 2 of section 200 of the Civil Code of 1959 with the following wording: 'Any contract contrary to legal rules or made to elude the legal rules is rendered null and void unless a legal rule attaches different legal consequences to it. A contract is likewise null and void when it is evidently contrary to the interests of the working people or to the requirements of socialist coexistence.'

This ruling came into being as a result of a development that had several stages. In the first draft of the law of obligations made in July 1953,[22] there was a shorter formulation according to which '[a] contract is null and void if it is contrary to legal rules or made to elude the legal rules or is not in the interests of the working people in some other way.' (See Bodzási, 2018, fol. 19, p. 8.)

In the draft of the law of obligations of October 1954 signed by Nizsalovszky, Világhy, and Eörsi, three further states of affairs were added to the first version of the new rule. One of them was a reference to the contracts contrary to the planned tasks of both parties. A further type of nullity was constituted by contracts contrary to the requirements of socialist coexistence, and a third case was constituted by the contracts aimed to damage the state (see Bodzási, 2018, fol. 19, p. 74).

The reference to the interests of the working people was modified in the version in question by inserting the adverb 'evidently.' This addition could have been inspired by art. 2 of the Swiss Civil Code,[23] and it obviously served to increase the certainty of the law. This modification is a little sign of the political changes after Stalin's death in 1953.

Moreover, the codification commission wished for a reference to 'socialist morals' to be added to the wording of the law (see Bodzási, 2018, fol. 19, p. 74). This proposal does not seem to have any echo in the later materials. It is strange that the word 'morals' was not acceptable even though accompanied by the word 'socialist.'

It was Gyula Eörsi who inserted (in ink) the word 'determined' before the words 'planned tasks' in a copy of the September 1955 Draft. At the same time, Eörsi also added (again in ink) that the reference to damaging the state should be discussed (for both corrections by Eörsi see Bodzási, 2018, fol. 19, p. 174). These proposals were also aimed to increase the certainty of the law that Eörsi felt was being endangered by such general clauses.

In a later version of the Draft probably at the end of 1955, the reference to the conflict with planned tasks was struck out in ink but the reference to damaging the state was left untouched (see Bodzási, 2018, fol. 17, p. 1). In a somewhat later version of the Draft, which no longer contained a reference to the planned tasks, the reference to damaging the state was also struck out in ink (see Bodzási, 2018, fol. 19, p. 218).

In spite of the corrections aimed to increase the legal certainty, critical observations were made that the reference to 'fraudulent intention to evade the law'

(*in fraudem legis agere*) was not exact enough.[24] According to another, more radical criticism, the reference to the conflict with the interests of working people and the requirements of socialist coexistence would be superfluous since the corresponding cases were covered by the prohibition of contracts contrary to legal rules as well as contracts made 'in circumvention of the rules of law' (*in fraudem legis*). Furthermore, according to this criticism, these general clauses were dangerous as they made it possible to pass arbitrary sentences.[25]

These concerns, which can sometimes appear nowadays, did not have any impact on the legislation. The text formulated in the Draft of September 1956 (para. 2 of section 181 [later 200], see Bodzási, 2018, fol. 11, p. 59) was also preserved in the later versions and if compared with the final enacted version reveals only minor modifications of a stylistic character.

The ministerial rationale of the Bill of 1959, published together with the norm text of the Civil Code, referred explicitly to the fact that the reference to the conflict with the interests of the working people and with the requirements of socialist coexistence was substituted for the former prohibition of contracts contrary to good morals (HCC, 1959, p. 154).

Developments since the Novel of 1977

In the Novel of 1977, a more timely reference was substituted for the 'working people,' namely, 'society.' It was only the Novel of 1991 mentioned above in which the prohibition of contracts 'against good morals' (*contra bonos mores*) was substituted for the modified socialist formula in section 200, preserving, however, from the socialist definition the restrictive adverb 'evidently.' At the same time, the former reference to the 'public order' known in the respective provision of the Bill of 1928 was omitted by the Novel of 1991. Therefore, the Novel in question did not restore the formula of the Bill of 1928 completely. The new Hungarian Civil Code (Act No. V of 2013) has preserved the provision introduced in 1991 (section 6:96; cf. Földi, 2016, pp. 183f).

The judicature dealt thoroughly with the problem, in which cases an evident conflict with the interests of society or with the requirements of social coexistence could be verified. The selling of real estates of the state at a low price in bad faith was a typical case of violation of the interests of society. Violation of the requirements of socialist coexistence was verified when a person who was aware of the grave illness and bad medical prognosis of the other party concluded with him or her a contract for support (maintenance) or for life annuity in order to acquire the other party's apartment at a low cost.[26]

Conclusions

Drawing some general conclusions, we can ascertain that the socialist transformation of some classical principles of civil law in Hungary did not cause extremely grave damage. The contents of *bona fides* as well as that of *boni mores* were translated into a new and sometimes surprising language, but the changes can also

be seen as a kind of modernisation. The details of application of these general clauses of ancient origin sometimes became more understandable. Moreover, in the case of *bona fides,* the transformation was useful, namely, in order to avoid the confusion of the subjective and objective meanings of good faith. It should be noted that the traditional technical term 'good faith' itself is very problematical and has constituted a source of misunderstandings for many centuries (Juenger, 1995, p. 1253; Földi, 2007, pp. 53ff). It is less understandable why in socialist Hungarian civil law the notion of 'morals' could not apply even with the attribute 'socialist' either, despite such proposals attested by the preparatory materials.

As for the background of the low level of 'communist distortions' appearing in the codification of the HCC of 1959, several advantageous circumstances can be mentioned. The members of the codification commission were jurists qualified at a very high professional level in the period before the Second World War. They often represented a higher professional level than many of the jurists trained later in the socialist era, having to create the new 'capitalist' private law of Hungary after 1990. This inverse development of the recent past has not been less paradoxical than the former situation was in the 1950s.

Most of the members of the codification commission of the HCC of 1959 were not engaged communists or at least not before 1945. Some of them assumed the task because of opportunism. It has to be added, however, that the former regime known as Horthy era (1920–1944) became odious not only because of the tragic events that happened during the last years of the war. With regard to the adverse antecedents, the communist regime did not seem so much unacceptable in the time of its emergence as it seems nowadays.

As far as the preparatory materials allow us to judge it, the Soviet Union controlled the process of codification in an absolutely soft way. No detailed translations of the drafts were sent to Soviet jurists. There are only a very few direct references to the Soviet law in the preparatory materials. The more remarkable is that a number of references to the Bill of 1928 can be found in the same documents. These references are not always negative. As attested by the preparatory materials, the socialist features of the draft were moderated both after Stalin's death (1953) and after the revolution of 1956.

Naturally there were strict limits determining the socialist character of the codification. As referred to above, neither the notion of good faith and fair dealing nor that of the good morals could be mentioned in the norm text of the HCC until 1991. They might be referred to only in the rationale. These 'bourgeois' notions could not be admitted in the Novel of 1977 either, in spite of repeated proposals, albeit also this Novel reduced a bit the socialist character of some of the provisions in question. There was a slow, by no means a continuous, but in any case a long process of erosion of socialist character of the provisions limiting the private autonomy.

Finally, it was fortunate that the codification of the Hungarian Civil Code of 1959 was led by two highly qualified jurists, M. Világhy and Gy. Eörsi. Having become communists despite their 'bourgeois' roots, they had the political influence to retain a great many elements of the civil law tradition in Hungary.

Notes

1 Commercial law was regulated in Hungary by the independent Commercial Code of 1875, cf. Zlinszky, 1985, p. 435, p. 441.

2 On the basis of political considerations the communist regime distinguished a number of 'strata' of 'bourgeois' scholars and applied different treatment towards them. Some older professors like Endre Nizsalovszky (private law), Géza Marton (Roman law), or Ferenc Eckhart (legal history) could keep their chairs; Nizsalovszky and Marton could also keep their membership in the Academy of Sciences. Other professors appointed before 1944, e.g., Sándor Kornél Tury (Professor of Commercial Law in Budapest), were sent to the Institute of Administrative and Legal Sciences of the Hungarian Academy of Sciences so that they would not disturb the ideological development of the students. Tury had the opportunity to make observations on the drafts of the new Civil Code; see, e.g., Bodzási, 2018 [http://impp.mhk.hu/document/view/id=17], p. 192 (as for the following references to the Preparatory Materials, the number of the corresponding folder and that of the electronic page will only be given). The case of István Szászy (Professor of Private Law and Private International Law in Budapest, known also as Étienne de Szászy) was peculiar because he was forced to retire in 1951 but he did not lose his membership in the Academy of Sciences. In the 1950s, he could earn money as a translator. From the 1960s, a number of his monographs were published in Hungary in English. See Burián, 2001, pp. 147ff.

3 The role or even the raison d'être of the general part was discussed in Soviet legal literature as well as in some other socialist countries. A letter sent by the Secretary of State of the East German (GDR) Ministry of Justice, Dr. Toeplitz, to the Hungarian Minister of Justice in February 1959 seems to be sceptical as regards the rejection of the general part. Dr. Toeplitz was curious about the arguments for this solution being discussed in the GDR, see the original letter in Bodzási, 2018, fol. 8, pp. 781ff. A head of department, István Timár answered that the system of the civil code did not have to be identical with the scientific system of civil law and the latter necessarily contained a general part. See Timár's letter sent in April 1959 in Bodzási, 2018, fol. 8, p. 785ff.

4 I did not find the original text of Venediktov's letter. Among the preparatory materials published recently a Hungarian translation can be found, see Bodzási, 2018, fol. 8, pp. 570ff. This document does not contain any reference to whom the letter was sent.

5 For the scientific oeuvre of Pólay, see Éva Jakab's study in this volume. A folder of the preparatory materials of the Civil Code of 1959 contains Elemér Pólay's offprint from the *Acta Antiqua Academiae Scientiarum Hungaricae* (vol. 5 [1957]; this is a study entitled *Die Blütezeit des römischen Wirtschaftslebens und die klassiche Zeit des römischen Rechts*) dedicated to Béla Kemenes on the February 15, 1958 (see Bodzási, 2018, fol. 23, p. 704). It is, however, not probable that this study could be used during the codification work, and Pólay's study can be regarded here as a kind of 'textus fugitivus.' The preparatory materials attest that Pólay made several proposals in order to preserve as many classical institutions as possible in the new Civil Code, see, e.g., Bodzási, 2018, fol. 19, p. 963.

6 See http://impp.mhk.hu/document/view/id=49.

7 See G. Marton, *Tervezet egy polgári törvénykönyv kártérítési fejezetéhez* (A draft of the chapter on damages of a new Civil Code) in Bodzási, 2018, fol. 17, pp. 257–329. Marton's draft was first published (in a different version) in his posthumous monograph: Marton, 1992, pp. 298–327. For more on Géza Marton himself, see Szabó, 2001, pp. 424f.; Hamza, 2009, pp. 398f.

8 See F. Mádl, *Az objektív felelősségi rendszer történelmi kialakulása* (Historical formation of the system of strict liability) in Bodzási, 2018, fol. 23, pp. 640–703.

Ferenc Mádl was a professor at the Eötvös Loránd University (Budapest); a member of the Hungarian Academy of Sciences; and, between 2000 and 2005, President of the Republic of Hungary.

9 This document was written for the professional and political training of jurists in the framework of a conference organised by the Department of Codification of the Ministry of Justice; see the cover on p. 822 (Bodzási, 2018, fol. 4).

10 So still in the Draft of December 12, 1958 in Bodzási, 2018, fol. 14, p. 4. In this copy, however, the word 'community' is crossed out in pencil and the word 'society' is substituted. In another copy, the same correction was made with a pen, see ibid. p. 498.

11 See a copy of the Draft of 1955 with corrections made in both pen and pencil. Bodzási, 2018, fol. 16, p. 351. This correction was made prior to July 27, 1957, cf. ibid. p. 374.

12 Gy. Eörsi in Eörsi and Gellért, 1981, I, 49 observes that the socialist character of the cooperation laid down in section 4 means that the parties shall not be only neutral or peaceful as regards the other party's interests (as is the case in bourgeois legal systems) but they shall carry out activity as well if it is necessary in the given case. As an example, Eörsi refers to a judgment passed in 1970 according to which a special (remedial) recreation home, if being specialised also for receiving motor-disabled guests, should put carpets on the floor so that walking is made safer.

13 A section crossed out with red pencil can be found in a copy of the Draft of September 1956 (see Bodzási, 2018, fol. 11, p. 247). In the Draft published in autumn 1957 this provision is already omitted (see ibid. p. 699). 'Enterprises ha[d] to report on the state of plan fulfilment of the annual plan every quarter or even at shorter intervals,' see Földi, 1992, II, p. 582.

14 The Novel of 1977 inserted a new provision into section 4 in which the idea of the planned economy reappeared. This modification was, however, in connection with the liberalisation of the economy.

15 See the Draft Rationale of Spring 1957 in Bodzási, 2018, fol. 12, pp. 15f; similarly in the (printed) Draft Rationale of August 1957 in fol. 2, p. 113 as well as in the (printed) Draft Rationale of Autumn of 1957 in fol. 11, p. 701, p. 974.

16 Berndt also made further conservative proposals, e.g., to receive sections 4–7 of the Bill of 1928 as well as to include also family law in the Civil Code; see ibid. fol. 16, p. 44.

17 A prominent representative of this course was also the internationally well-known legal philosopher and comparatist Imre Szabó (1912–1991), Director of the Institute of Administrative and Legal Sciences of the Hungarian Academy of Sciences. In 1955 Szabó published a controversial monograph radically condemning the older Hungarian legal philosophy. Szabó stated in a conference on the civil law codification in his Institute on February 14, 1957, that the Draft Rationale contained too many historical elements while the earlier Hungarian private law should be forgotten and the new Civil Code as a tabula rasa should not be interpreted on the basis of the former judicature but on its own basis, in accordance with the principles of the people's democracy (see Bodzási, 2018, fol. 21, p. 1360).

18 Currently, in the new Hungarian Civil Code adopted as Act V of 2013, the implicit conduct is no longer regulated in the Preliminary provisions but in the chapter entitled 'Further facts generating an obligation,' and specifically in section 6:587. Such a transplant was earlier suggested in 1958 by the Supreme Court (see Bodzási, 2018, fol. 8, p. 491) as well as by Endre Nizsalovszky, with reference to the *variae causarum figurae* of Roman law (see Bodzási, 2018, fol. 9, p. 116). Nizsalovszky ascertained, however, that the implicit conduct does not belong to the conducts causing damage.

19 At this point it is necessary to refer to the problem of the different interpretations of good faith in various legal cultures. A number of jurisdictions firmly differentiate between (1) subjective good faith characterised by belief in the lawfulness of one's possession, etc. (in German *guter Glaube*) and (2) objective good faith and fair dealing (in German *Treu und Glauben*). The dualist interpretation derives from the older *ius commune*, but it gained importance only as a consequence of a monograph by Wächter, 1871. Since then the dualist interpretation has been embraced the world over. For a detailed treatment, see Földi, 2007, pp. 53ff; idem, SZ Rom. Abt. 124 (2007), pp. 603ff; idem, 2010, pp. 483ff; idem, 2014, pp. 312ff. See also, e.g., Martins-Costa 2015, pp. 40ff; Novaretti, 2010, pp. 953ff. Before the global spread of a dualist interpretation, a kind of 'subjective monism' prevailed which regards good faith always as a subjective state of mind. Besides these interpretations a kind of 'objective monism' is also known, which is dominant in Austrian law in which good faith is called *Redlichkeit*. As for the future, it cannot be ruled out that a pluralist interpretation will become predominant, which acknowledges various meanings of good faith. Cf. Zimmermann and Whittaker, 2000, pp. 690ff. Cardilli, Dajczak, Fiori, Stolfi and Zannini warn of the dangers of a dualist interpretation, see Garofalo 2003, and cf., with detailed bibliographic data, Földi, SZ Rom. Abt. 124 (2007), pp. 603ff, idem, 2007, pp. 53ff.

20 The Novel of 1977 inserted into para. 1 of section 4 a second phrase, which laid down that '[e]conomic organisations shall act in their civil law relations in compliance with the requirements of the planned and proportional development of the people's economy.' The same Novel inserted into para. 4 of section 4 a first phrase, according to which '[un]less this Act provides a stricter requirement, one has to proceed in civil law relations as it may generally be expected in the given situation.'

21 As is generally known, in 2016 an important reform of the French Code civil in some places deleted references to *bonnes mœurs*.

22 As observed in the preliminary remarks, the Department of Codification thought that it was feasible to create a draft of the law of obligation, i.e. not in the framework of a civil code, see Bodzási, 2018, fol. 19, p. 2. See also Eörsi's note in the same sense in a copy of a draft of 1953 (written in ink), ibid. p. 39.

23 See para. 2 of section 2 of the Swiss ZGB: 'Der offenbare Missbrauch eines Rechtes findet keinen Rechtsschutz.' The official translation is: 'The manifest abuse of a right is not protected by law.' It is to be noted that the corresponding provision in the Bill of 1928 (para. 2 of section 2) inspired otherwise by the Swiss Civil Code, did not contain the attribute 'manifest.'

24 This observation was made by the Legal Department of the Hungarian National Bank in February 1955, see Bodzási, 2018, fol. 19, p. 1166. It is remarkable that the most Western civil codes do not declare the prohibition of in *fraudem legis agere*, except the Italian Codice civile of 1942 in its art. 1344 (*contratto in frode alla legge*). This prohibition can be traced back to Roman law, see Paul. D. 1.3.29.

25 This criticism was made by an attorney called László Sarlós at an official conference held in Szekszárd in January 1958, moderated by Professor Lóránt Rudolf (University of Pécs), see Bodzási, 2018, fol. 19, p. 1261. A similar criticism was presented by a public prosecutor named Gyula Zoltay at another official conference held in Győr in January 1958, moderated by the Vice President of the Supreme Court, László Sztodolnik, see ibid. p. 1268.

26 See K. Benedek in Eörsi and Gellért, 1981, I, p. 920 for data on related judgements. See more recently Menyhárd, 2004, pp. 31f; Deli, 2014, pp. 11ff.

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